IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1983
No. 83-2108

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ROBERT IVOR LEE CRISTALL,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

BARBARA MAVIS CRISTALL,

Real Party in Interest.

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# BRIEF IN OPPOSITION OF REAL PARTY IN INTEREST

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## QUESTIONS PRESENTED

1. Has the issue which petitioner raises here been properly presented to the highest California court in which a decision could be had?

2. Does petitioner Robert Ivor Lee Cristall have the necessary minimum contacts with California so that maintenance of a marital dissolution action there does not offend traditional notions of fair play and substantial justice?

## PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the Los Angeles County Superior Court are included in the caption of the petition for writ of certiorari. Real party in interest Barbara Mavis Cristall never appeared in the original proceedings before the California Court of Appeal or the California Supreme Court where petitioner Robert Cristall sought discretionary review via mandamus of the denial of the superior court's denial of his motion to quash service of process. The

California Court of Appeal denied petitioner Robert Cristall's petition for a peremptory writ of mandate upon consideration of Robert's papers only, without requiring a formal or informal response from real party in interest Barbara. Similarly, the California Supreme Court denied Robert's petition for hearing without an appearance or responsive papers from Barbara.

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## OPINIONS BELOW

There is no opinion of any California court in this case. The Los Angeles County Superior Court denied petitioner Robert Cristall's motion to quash service of process orally from the bench on February 22, 1984. A facsimile of this order appears as Appendix A to the petition for writ of certiorari. On April 5, 1984, the California Court of Appeal summarily denied Robert's petition for a writ of mandate and other relief, in which he

sought review of the superior court's denial of his motion to quash. A facsimile of this order is included in the petition for writ of certiorari as Appendix C. On May 2, 1984, the California Supreme Court denied Robert's petition for hearing from the California Court of Appeal's denial of his mandamus petition. Notification of this denial was given by postcard. No facsimile of the California Supreme Court's order is included in the petition for writ of certiorari.

Appendix B, attached to the petition for writ of certiorari, is a further order of the superior court on May 30, 1984. This order issued after all stays of trial court proceedings had expired. It is not an order under review in this case.

## JURISDICTION

The petition for writ of certiorari was timely filed after the California Supreme Court's denial of a hearing on May 2, 1984. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTES INVOLVED

California Code of Civil Procedure § 418.10 provides in relevant part:

"(c) If such motion [a motion to quash service] is denied by the trial court, the defendant, within 10 days after such service upon him of a written notice of entry of an order of the court denying his motion, or

within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive pleading in the trial court within the time prescribed by subdivision (b) unless on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for a good cause shown be extended by the trial court for an additional period not exceeding 20 days."

## STATEMENT OF THE CASE

On October 14, 1983, real party in interest Barbara Mavis Cristall [hereinafter "Barbara"] instituted the instant action for dissolution of her marriage to petitioner Robert Ivor Lee Cristall [hereinafter "Robert"] in the Los Angeles County Superior Court. In this action, Barbara seeks spousal support, child support, a determination of certain property, and various other relief including a set aside of a prior Canadian marital settlement agreement.

At the time Barbara filed suit, she was a resident of the Los Angeles County, California. She and Robert are Canadian citizens. Barbara has a petition for permanent residence pending with the Immigration and Naturalization Service. Her sister is an American citizen living in New Jersey. Barbara's immigration category is P 5-1, and her priority date is May 19, 1982. She entered the United States in August of 1982.

Unmentioned in the petition for writ of certiorari is the fact that Robert has an action pending against Barbara in the Court of Queen's Bench of Alberta, Canada, Judicial District of Edmonton, to have a prior marital settlement agreement between the parties declared null and void in its entirety. If the California court were held to lack personal jurisdiction over Robert and if the Canadian action were successful, Robert would be under no support obligations for his ex-wife and his minor children. Barbara has not made a general appearance in the Canadian action.

Robert's response to Barbara's California action was to file a motion to quash service of process. In opposition to the motion to quash, Barbara presented evidence that Robert does not come to California solely for the purpose of visiting his children. He visits California frequently as his girl friend lives in Los Angeles. During 1983, Robert visited

California on the average of once a month and his visits had an average duration of five days. Visitation with his minor children occupies only a small portion of each visit to California, the rest of the time being utilized for business and social activities within the state.

Both of Robert's parents live in California. Robert assisted in locating them there. His father is 77 years old and lives in a convalescent home in Long Beach, California; he suffers from Alzheimer's disease. Robert's mother is 71 years old and lives in a house at Leisure World in Laguna Hills, California. Robert consults with his parent's California doctors, assists them with their financial affairs and business decisions, and is a co-signator of their personal bank account at California Canadian Bank.

In 1971, Robert had eye surgery for glaucoma in California at the Jules Stein Institute. He returns to California twice a

year to have Dr. Straatsma check his eyes. Robert's uncle, Dr. Elliot Corday, is a practicing cardiologist in Beverly Hills.

Robert's activities in California constitute doing business in the State and the business is related to marital property located in California, the division of which marital property is the subject of dispute in the California lawsuit. Personally or through wholly-owned corporate entities, Robert owns two pieces of real property in California: the "Monterey property" and the "Orange County property."

The Monterey property consists of 600 acres of land 11 miles south of Carmel. Until a recent transfer of title by Robert to a corporation which is wholly-owned by another corporation wholly-owned by Robert, Robert was one of the record owners of the Monterey property.

On April 29, 1980, Barbara executed a grant deed transferring her interest in the Monterey County property to Robert. In a

letter dated that same date from Robert to Barbara, Robert stated that in the event of a divorce, execution of the "Quit Claim [sic] shall not be deemed to be a waiver by you of any claim that you may have under Alberta law or any other jurisdiction that may be involved with such proceedings relating to this property as it forms part of my estate."

Robert's activities with regard to the Monterey property are extensive. He and the other co-owners used the assistance of a California attorney, a California real estate broker and a California appraiser to assist with acquisition of the Monterey property. Robert hired an architect to design a building on the property and paid the architect personally. He has paid California property taxes on his interest in this property. He has put the property up for sale. While the Monterey property is primarily investment property, Robert has considered building a house on the property.

Robert borrowed money from his company,

Lee Equities, to purchase the Monterey property, and, about two months before the hearing on the motion to quash, he transferred his interest in the property to Balboa Equities. Robert is a 100% shareholder of Lee Equities, and Lee Equities is a 100% shareholder of Balboa Equities. In an exhibit attached to the Order To Show Cause in the California superior court, Robert's accountants had included the financial activities of Lee Equities and Paragon Equities (now reorganized into Balboa Equities) to calculate Barbara's marital interest in the property of their marriage. Robert utilizes accountants to do work for him in California. This work includes accounting services with regard to Balboa Equities.

With regard to the Orange County property, Robert transferred his personal interest in this property to Balboa Equities and Harry Friedman in September, 1982. At the request of Robert, Barbara executed a

quitclaim deed transferring all of her rights in the Orange County property to Robert on August 10, 1977. The real property in Orange County is about an acre and one half of land improved with a parking lot. The land is leased to a bank.

There is a further factual issue in the California action with respect to an alleged California oral modification of the Canadian marital settlement agreement originally entered into by the parties.

After receiving the evidence and hearing oral argument of counsel on Robert's motion to quash, the trial judge in the Los Angeles County Superior Court ruled from the bench as follows:

> "THE COURT: This is not a close case in any way. The motion to quash is denied." (RT 17.)

On April 5, 1984, the California Court of Appeal summarily denied Robert's petition for a writ of mandate and other relief, in which he sought review of the superior

court's denial of his motion to quash. On May 2, 1984, the California Supreme Court denied Robert's petition for hearing from the California Court of Appeal's denial of his mandamus petition.

## REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

### I

### PETITIONER HAS NOT BEEN TO THE HIGHEST CALIFORNIA COURT IN WHICH A DECISION COULD BE HAD BECAUSE OF AN ADEQUATE PROCEDURAL GROUND SUPPORTING DENIAL OF REVIEW BY THE CALIFORNIA COURT OF APPEAL AND SUPREME COURT

Under 28 U.S.C. § 1257, this Court's jurisdiction to review state court judgments is limited to judgments "by the highest court of a state in which a decision could be had." Important policy consideration underlie this limitation. As this Court observed in Costarelli v. Massachusetts, 421 U.S. 193, 196 (1975), "[a]n important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may

be otherwise resolved."

If the judgment of a state trial court is subject under state law to discretionary review by a higher court, such review must be sought. If the appellate court declines to review the case, the trial court's judgment becomes that of the highest court in which decision could be had. Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock, 279 U.S. 410 (1929).

In this case, California law provides a discretionary avenue of appellate review for denial of motions to quash service of summons for alleged lack of personal jurisdiction. California Code of Civil Procedure section 418.10 provides a 10-day time period in which to seek review of a denial of a motion to quash by the filing of a petition for a writ of mandate in the California Court of Appeal.

Petitioner's motion to quash was denied on February 22, 1984. Petitioner's counsel was present in court and heard the ruling from the bench. Petitioner did not file his

petition for writ of mandate until March 29, 1984 -- over a month later. (See Appendix C to Petition for Writ of Certiorari.) Appended to the petition filed with the California Court of Appeal was a copy of the Reporter's Transcript of the hearing on the motion to quash, which was proof that petitioner had written notice that the trial court had denied the motion to quash. The reporter's certificate at the back of transcript shows that the transcript was prepared on February 26, 1984, so that presumably counsel for petitioner had the transcript in hand a few days thereafter for purposes of preparing the petition to the California Court of Appeal.

Thus, when the California Court of Appeal summarily denied the petition for writ of mandate on April 5, 1984 and the California Supreme Court denied a hearing thereafter, the probable reason for the denials was what each court considered to be an apparent procedural default -- a tardy

filing. In addition to seeking review by the proper method, a litigant must comply with the requirements of state appellate procedure. If the state's highest court denies review for failure to comply with reasonable procedural rules, "the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court." Newman v. Gates, 204 U.S. 89, 95 (1907).

In this context, the requirement that state appellate remedies be exhausted becomes mingled with the adequate state law ground doctrine. Noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider a federal question, as not properly presented to the highest state court. Parker v. Illinois, 333 U.S. 571 (1948).

II

THE TRIAL COURT'S DENIAL OF THE MOTION TO QUASH WAS CORRECT ON THE MERITS

In this case, the constitutional standard for determining whether California has personal jurisdiction over petitioner

Robert Cristall in the pending state court family law proceedings is set forth in this Court's opinion in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945): that a defendant "have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Brackets added; citations omitted.)

From the Statement of the Case above, it should be readily apparent that this case is a far cry from the facts of Kulko v. Superior Court, 436 U.S. 85 (1978). There the appellant's only connection with California was his acquiescence in the stated preference of one of his children to live with her mother in California. As this Court summed up Kulko, "[t]his single act is not surely one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles

away, and we therefore see not basis on which it can be said that appellant could reasonably have anticipated being 'haled before a [California] court . . . ." 436 U.S. at 97-98 (citation omitted).

In this case, petitioner Robert Cristall is no stranger to California. In the normal conduct of his business and non-business affairs, Robert is in California for an average of five days each month. Previously in his own name and now through wholly-owned corporations, he owns two pieces of real estate in California. With respect to the Monterey property, he acknowledged in his April 29, 1980 letter that Barbara's deed of the property to him was not a "waiver" of any claim she had to the property, which he acknowledged to be part of the marital estate. That acknowledgment of his wife's claim to a piece of California property was surely a basis for reasonable anticipation of possible California adjudication of rights in that piece of property as part of the estate.

Since Robert is frequently in California for business and social reasons and since his ex-wife and their minor children now reside there, the totality of all the facts of this case would have led a reasonable husband/parent to expect that he might be sued for dissolution of his marriage there. The fact that Robert already employs lawyers and accountants to deal with his business affairs in California coupled with the frequency of his physical presence in the State, his ownership of real property there, and his relatives and children there, his financial burden and personal strain from litigating in California is not substantial greater than a full-time resident. Indeed, his burden and strain from litigation in California is probably no greater than it would be if suit had been brought in Edmonton, Alberta, in view of the fact that Robert appears to be on the road a lot. Robert is no hapless tourist served with process while changing planes at an airport;

his contacts with California are real and very substantial.

Robert benefits from the protection of California laws for the properties he owns there and the corporations through which he does business. By ownership and management of these properties, there is action "by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum state. Hanson v. Denckla, 357 U.S. 235, 253 (1958). The fact that the properties are relevant to questions of support and property division in divorce proceedings makes them equally relevant to a determination of whether there is personal jurisdiction related to these items. Furthermore, the California trial court quite properly looked behind the corporate facade to the real substance of ownership of the Monterey and Orange County properties. Wholly-owned corporations should not be permitted to shield a husband and father from adjudication of his support duties. Doing

business in California, coupled with regular physical presence and the other contacts already discussed, makes personal jurisdiction tenable in this case. It should not offend traditional notions of fair play and substantial justice.

In the Kulko decision, this Court recognized that the "minimum contacts" test of International Shoe is not susceptible of mechanical application and that few answers will be written in black and white. 436 U.S. at 93. Instead, "[t]he greys are dominant and even among them the shades are innumerable." Estin v. Estin, 334 U.S. 541, 545 (1948). The instant case is a case in which the trial court weighed the facts to determine whether the requisite affiliating circumstances were present and made a judgment call in favor of Barbara.

This case does not break any new ground. It merely applies now familiar rules to a specific factual situation. The superior court's application of the minimum contacts

test in this case does not represent an extension of International Shoe and, if sustained, the result will not be unfair, unjust or unreasonable. For these reasons, the instant case does not present an important question of law for decision by this Court. Any decision announced in this case would have little impact beyond the parties themselves.

Finally, it should be noted that petitioner Robert's challenge to the jurisdiction of the California superior court is overbroad. The California courts recognize the concept of divisible divorce. Because of Barbara's residence in California, California has jurisdiction to dissolve the marital status, irrespective of personal jurisdiction to adjudicate support rights or to divide marital property. See Estin v. Estin, supra, 334 U.S. at 549; Worthley v. Worthley, 44 Cal.2d 465, 468, 283 P.2d 19 (1955).

## CONCLUSION

For the foregoing reasons, real party in interest Barbara Mavis Cristall urges that this petition for a writ of certiorari be denied.

Dated: July 14, 1984.

Respectfully submitted,

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